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No. 76

In the Supreme Court of the United States

OCTOBER TERM, 1942

JESSIE WILLIAM MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the circuit court of appeals affirming the judgment of conviction (R. 88–89) is reported at 123 F. (2d) 715. Its initial opinion on petition for rehearing (R. 99–100) is reported at 124 F. (2d) 849. Its opinion denying the petition for rehearing (R. 125–127) is not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered November 25, 1941 (R. 90). The petition for rehearing was denied March 25, 1942 (R. 125–

127). The petition for writ of certiorari was filed April 21, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Rules in Criminal Cases promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether a defendant in a criminal action may require the Government to furnish a transcript of the testimony for the defendant's use on appeal in *forma pauperis* where a shorthand record of the testimony was taken by the trial judge's secretary but was transcribed only in part.

STATUTE INVOLVED

The *forma pauperis* statute as amended provides (Act of July 20, 1892, c. 209 § 1, 27 Stat. 252, 36 Stat. 866, 42 Stat. 666; 28 U. S. C. 832):

> Any citizen of the United States entitled to commence any suit or action, civil or criminal, in any court of the United States, may, upon the order of the court, commence and prosecute or defend to conclusion any suit or action, or an appeal to the circuit court of appeals, or to the Supreme Court in such suit or action, including all appellate proceedings, unless the trial court shall certify in writing that in the opinion of the court such appeal is not taken in good faith, without being required to prepay fees or costs or for the printing of the record in the appellate court or give security therefor, be-

fore or after bringing suit or action, or upon appealing, upon filing in said court a statement under oath in writing, that because of his poverty he is unable to pay the costs of said suit or action or appeal, or to give security for the same, and that he believes that he is entitled to the redress he seeks in such suit or action or appeal, and setting forth briefly the nature of his alleged cause of action, or appeal. In any criminal case the court may, upon the filing in said court of the affidavit hereinbefore mentioned, direct that the expense of printing the record on appeal be paid by the United States, and the same shall be paid when authorized by the Attorney General.

STATEMENT

On February 3, 1941, after a jury trial lasting several days, petitioner was convicted of kidnapping in violation of the Act of June 22, 1931, as amended, 47 Stat. 326, 48 Stat. 781; 18 U. S. C. 408a (R. 6). A verdict of not guilty was directed as to his wife, who was a co-defendant (R. 63). Petitioner was sentenced to seven years' imprisonment (R. 7). The sentence later was reduced to five years' imprisonment (R. 7A). Thereafter, petitioner, who was represented by appointed counsel, appealed in *forma pauperis* to the circuit court of appeals (R. 10, 12–13, 83).

The assignments of error (R. 12–13) and brief (p. 2) filed in petitioner's behalf on appeal raised only the questions whether petitioner was a "par-

ent" of the person kidnapped, who was his wife's illegitimate daughter by another man, and whether the daughter was a "minor," within the meaning of those terms as used in the excepting clause of the kidnapping statute.[1] The bill of exceptions filed by petitioner accordingly included a transcript of only such portions of the testimony as were considered pertinent to those issues (R. 14–78). The remainder of the testimony had been taken down in shorthand by the secretary to the trial judge, but had not been transcribed (R. 78, 105, 106, 108, 110).

On November 25, 1941, the circuit court of appeals affirmed the judgment of conviction; it held that petitioner was not a "parent" (R. 83–89; 123 F. (2d) 715). Thereafter, petitioner filed in the circuit court of appeals a "Petition for Rehearing and Writ of Certiorari" (R. 94–98). He contended in this that the evidence did not support the verdict and requested that the trial court be directed to have a full and complete transcript of the testimony prepared at the expense of the Government and forwarded to the circuit court of appeals in order that the question of the sufficiency of the evidence might be determined (R. 98). The cir-

[1] Petitioner's brief in the circuit court of appeals (pp. 2, 23) contained statements to the effect that petitioner would have assigned as error and contended that the verdict was against the weight of the evidence if he had been able to raise funds sufficient to pay the stenographer for transcribing all of the "voluminous testimony" so that it might be incorporated into his bill of exceptions.

cuit court of appeals thereupon rendered an opinion in which it said that petitioner's statement of the case, if true, indicated that he was wrongfully convicted and in which it adverted to the action of this Court upon consent of the Government in *Holmes* v. *United States*, decided December 8, 1941, No. 50, this Term, vacating the judgment of the circuit court of appeals in that case with instructions to afford an opportunity to the parties to agree upon a bill of exceptions. In order to ascertain whether the Government would consent to a reopening of the instant case, the court ordered the Attorney General and the United States Attorney to file responses to the "Petition for Rehearing and Writ of Certiorari" and to the court's opinion (R. 99–100; 124 F. (2d) 849).

The United States Attorney thereupon filed a response in behalf of the Attorney General and himself (R. 101–110). The response distinguished the situation in the *Holmes* case from that in the instant case (see *infra* p. 5) and opposed petitioner's applications on various grounds including that the Government could not legally pay for a transcript of the testimony. On March 25, 1942, the circuit court of appeals rendered an opinion denying the petition for rehearing and request for a transcript of the testimony on the ground that the court already had determined the only question which it had jurisdiction to decide upon the bill of exceptions filed by petitioner (R. 125–127).

ARGUMENT

Petitioner contends (Pet. 11) that the *forma pauperis* statute entitled him to a complete transcript of the testimony at the expense of the Government. This contention, however, was not made until after the bill of exceptions filed by petitioner had been settled (R. 79) and the appeal been decided. Accordingly, petitioner is in no better position to raise the question than was the petitioner in *Monsen* v. *United States*, No. 647, October Term, 1940, where similar circumstances were presented and certiorari was denied. 312 U. S. 701.[2] In any event, moreover, the contention is untenable on the merits.

The *forma pauperis* statute (*supra*, p. 2) permits impecunious persons to appeal without prepayment of fees or costs and provides that the court may direct that the expense of printing the record be paid by the United States upon authorization of the Attorney General. However, it contains no

[2] In *Evans* v. *United States*, No. 315, October Term, 1940, a capital case in which the defendant had made a timely application to secure the transcript at the expense of the Government, this Court granted certiorari, 311 U. S. 635. The cause later was remanded on stipulation of the parties (312 U. S. 651), the Government having ascertained that the trial judge's secretary who had taken the shorthand notes in that case was under contractual obligation as reporter to furnish the Government a transcript free of charge on request of the United States Attorney. Such circumstance was peculiar and we are advised that it has been changed and that the secretary of the trial judge in the instant case was and is under no similar obligation.

provision with respect to who shall stand the cost of furnishing the transcript of record. Accordingly, the court below and other courts have held without exception that the statute does not authorize the issuance of an order compelling the Government to furnish a transcript at its expense or at the expense of the trial judge's secretary or official reporter, whether or not employed by the Government. *United States* v. *Otis*, 18 F. (2d) 689 (C. C. A. 8); *Estabrook* v. *King*, 119 F. (2d) 607, 610 (C. C. A. 8); *United States* v. *Avis*, 108 F. (2d) 457 (C. C. A. 3); *United States* v. *Strewl*, 28 F. Supp. 87 (N. D. N. Y.); *United States* v. *Fair*, 235 Fed. 1015 (N. D. Cal.); *Cheek* v. *Thompson*, 33 F. Supp. 497 (W. D. La.). Rulings of the Comptroller General are in accord with these decisions. 9 Comp. Gen. 503; 21 Comp. Gen. 347. See also 19 Comp. Dec. 760; 20 Comp. Dec. 731; 5 Comp. Gen. 650.

Petitioner relies on *Holmes* v. *United States*, *supra*. But that case has no bearing herein. It involved no question as to whether the Government should furnish a transcript at its own expense. The question simply was whether the bill of exceptions filed by the defendant was adequate. The bill included a transcript of the testimony transcribed from the shorthand notes of defendant's stenographer, but the notes covered only a portion of all the testimony given at the trial. After the petition for writ of certiorari was filed, it developed

that a bill of exceptions satisfactory to both parties might possibly be settled. The Government accordingly consented to the action taken by this Court vacating the judgment of the circuit court of appeals and remanding the cause with instructions to afford the parties opportunity to agree upon a bill.

CONCLUSION

The case was correctly decided below and there is no conflict of decisions. The petition for a writ of certiorari therefore should be denied.

Respectfully submitted.

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MAY 1942.

U. S. GOVERNMENT PRINTING OFFICE: 1942